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No. 90-1607

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

SCOTT MANATT, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether an agreement between petitioner and a federally insured bank purporting to release petitioner from liability on promissory notes was valid under 12 U.S.C. 1823(e) as a defense to a collection action brought by the FDIC after the bank failed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 922 F.2d 486. The opinion of the district court (Pet. App. A11-A24) is reported at 688 F. Supp. 1327.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1991. The petition for writ of certiorari was filed on April 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between December 1980 and October 1983, the Corning Bank of Corning, Arkansas, loaned more than $380,000 to petitioner, a stockholder of the bank and

occasionally its lawyer. Pet. App. A2. The loans were made in consideration for seven promissory notes payable to Corning, two of which were secured by collateral: one by a mortgage on property owned by petitioner and his wife, and another by an airplane owned by petitioner. *Ibid.*

By January 1984, petitioner still owed Corning more than $370,000 on the seven promissory notes. Pet. App. A30-A31. That month, he and Corning jointly executed a document entitled "Mutual Agreement for Liquidation of Collateral." The agreement, signed by petitioner and his wife and by the president of Corning, purported to transfer ownership of the collateral securing two of petitioner's promissory notes, as well as a $50,000 promissory note payable to petitioner, in exchange for the bank's release of petitioner's indebtedness to it. *Ibid.* Despite the agreement, Corning did not cancel petitioner's promissory notes or return them to him; when the FDIC subsequently conducted an examination of Corning, the bank's records showed that petitioner still owed the bank $362,000. *Id.* at A3.

On June 15, 1984, the Arkansas Bank Commissioner declared Corning insolvent, closed it, and appointed the FDIC as receiver pursuant to 12 U.S.C. 1821(e).[1] Pet. App. A3. The FDIC entered into a "purchase and assumption" transaction under 12 U.S.C. 1823(c)(2)(A), whereby all of Corning's deposit liabilities and some of its assets were transferred to another FDIC-insured institution and the FDIC purchased, in its corporate capacity, Corning's remaining assets. Pet. App. A3. Included in the assets bought by the FDIC were petitioner's seven promissory notes, which were still in the bank's files. *Ibid.* The FDIC sold the collateral that secured the notes and sued petitioner in the United States District Court for the Eastern District of

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[1] Corning was chartered by the State of Arkansas and insured by the FDIC. See Pet. App. A3, A16.

Arkansas to collect the outstanding balance of his debt.[2] *Id.* at A4. Petitioner answered that the January 1984 agreement had extinguished his debt to Corning, and the parties cross-moved for summary judgment. *Id.* at A12.[3]

2. In May 1988, the district court entered partial summary judgment in favor of the FDIC. Relying on *Langley* v. *FDIC*, 484 U.S. 86 (1987), the court held that petitioner's agreement with the bank was void under 12 U.S.C. 1823(e)(2) because the agreement, signed well after the execution of the promissory notes, did not satisfy the "contemporaneous execution" requirement. That requirement invalidates any "agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset * * * unless such agreement * * * shall have been executed by the bank and the person * * * claiming an adverse interest thereunder * * * contemporaneously with the acquisition of the asset by the bank." 12 U.S.C. 1823(e); Pet. App. A15. Having so held, the court did not reach the question whether the agreement complied with the other requirements of Section 1823(e), but expressed doubt that "the agreement was kept continuously as an official record of the bank," or that the minutes of the board of directors adequately reflected the agreement, as required by Section 1823(e)(3) and (4). Pet. App. A15.

The district court held in the alternative that the FDIC was a holder in due course of petitioner's notes under federal

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[2] The proceeds from the sale of the collateral and from the $50,000 promissory note satisfied only a small portion of petitioner's outstanding debt to the Bank. The FDIC netted $22,848.96 from the sale of the property and only $7,000 from the airplane. The promissory note was discharged in bankruptcy after the promisor had made payments totalling $5,371.90. Pet. App. A3-A4.

[3] Petitioner also asserted several affirmative defenses, including res judicata, estoppel, waiver, ratification and collateral estoppel. See Pet. App. A19-A23.

common law, thus barring his defense of accord and satisfaction. Pet. App. A16-A17. The court also held that the agreement did not constitute an accord and satisfaction under Arkansas law. *Id.* at A15.[4] In July 1989, after holding a hearing on the value of the collateral, the district court entered judgment in favor of the FDIC in the amount of $504,594.33, which reflects the principal plus accrued interest through June 1989. *Id.* at A5, A25.

3. The court of appeals affirmed. Pet. App. A1-A11. Although the court declined to rule on the district court's holdings on the contemporaneousness requirement and the FDIC's status as a holder in due course, *id.* at A4-A5, A7, it held "as a matter of law that the Mutual Agreement was insufficiently recorded in the minutes of the bank's Board of Directors to satisfy" 12 U.S.C. 1823(e)(3). Pet. App. A7. That Section invalidates any agreement that interferes with the FDIC's rights unless it "shall have been approved by the board of directors of the bank or its loan committee." The court reached its conclusion because "[t]he board minutes did not recite that the agreement was attached, or set out its terms, or even specifically refer to [petitioner]." Pet. App. A7. Thus, the court of appeals held that the agreement did not bar the FDIC from collecting on petitioner's notes.[5]

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[4] The district court rejected petitioner's estoppel, waiver, ratification, res judicata and collateral estoppel defenses. Pet. App. A19-A23.

[5] The court of appeals also upheld the district court's rulings rejecting petitioner's estoppel, res judicata, collateral estoppel and waiver claims. Pet. App. A8.

One judge concurred in the panel's result, but wrote separately to state that he would have upheld the district court's ruling on the grounds relied on by that court. Pet. App. A8-A11.

ARGUMENT

Petitioner contends (Pet. 8, 11-12, 14-15) that the application of the contemporaneous execution requirement to preclude his accord and satisfaction defense contravenes *Langley* v. *FDIC*, *supra*. No further review on that issue is warranted, however, because the court of appeals expressly declined to affirm the district court's decision on that ground. Pet. App. A7-A8. In any event, the district court's decision was correct. Section 1823(e) by its terms allows "[n]o agreement" to interfere with the FDIC's collection efforts unless the agreement was executed contemporaneously with the bank asset (in this case the seven promissory notes) to which the agreement relates. The statutory terms are clear and unambiguous, and apply in this case to invalidate the agreement between petitioner and the bank, which was entered into long after the promissory notes were issued.[6]

Petitioner also argues (Pet. 9, 12) that his agreement with the bank to cancel his notes satisfies the statutory requirement that an agreement be reflected in the minutes of the board of directors or the minutes of the loan committee. Specifically, petitioner contends (Pet. 9) that the bank's loan committee approved the agreement, as reflected by the agreement itself, which, he claims, is sufficient under the statute. That argument is without merit.

Petitioner does not challenge the court of appeals' ruling that the agreement is insufficiently reflected in the minutes

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[6] The court of appeals was "not so willing to embrace" that view of the contemporaneousness requirement because it "doubt[ed] that Congress intended that [the requirement] would defeat a valid accord and satisfaction entered into by a bank." Pet. App. A7 n.4. However, because "[t]he seven notes were never canceled or returned to [petitioner], * * * the accord, if one at all, remained executory," and "was never completed." *Id.* at A6 n.3. Thus, the issue of contemporaneousness is not presented here in any event.

of the board of directors. Neither does he argue that recorded proceedings of the loan committee memorialize its discussion of the agreement. Instead, he seeks to bootstrap the agreement itself into proof that the loan committee carefully considered the agreement: in essence, he argues that the bank president's signature on the agreement proves that it was carefully considered by the loan committee. Petitioner's reasoning contradicts the statute, whose terms require an agreement to "be *reflected in the minutes* of [the] board [of directors] or [loan] committee." 12 U.S.C. 1823(e)(3) (emphasis added). That language compels the conclusion that the agreement itself does not satisfy the statute.

That conclusion is especially sound in light of the statute's purposes, one of which "is to allow federal * * * bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Such evaluations are necessary when * * * the FDIC is deciding whether to liquidate a failed bank, * * * [t]he * * * kind of evaluation [that] must be made 'with great speed.'" *Langley*, 484 U.S. at 91. In this case, the FDIC purchased Corning's assets based on its evaluation of Corning's records. Because petitioner's notes were still on the bank's books, in its possession, and by all appearances enforceable, the FDIC was entitled to rely on the notes' facial validity in its subsequent collection efforts.

Another purpose of the statute is to "ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms * * * when a bank appears headed for failure." *Langley*, 484 U.S. at 92. The transaction at issue in this case—forgiveness of more than $360,000 of debt in exchange for property worth $35,000—is unusual at best, and looks more so when engaged in by one of the bank's stockholders (and its lawyer) six months before the bank's failure. Without evidence of "mature consideration" by the loan committee or board of

directors—of which there is none—petitioner's argument was properly rejected by both courts below.[7]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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[7] To the extent that petitioner appears to argue (Pet. 11) that the courts below should have estopped the FDIC from denying the validity of the agreement and that the FDIC has received the benefit of the agreement without its burdens, his arguments are incorrect. This Court has specifically declined to "engraft an equitable exception upon the plain terms of the statute," *Langley* 484 U.S. at 94, and in any event the district court deducted the full value of petitioner's collateral from its award.

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